



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2010

Mr. Carey Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2010-14567

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 395242.

The Texas Health and Human Services Commission (the "commission") received five requests for proposals submitted in response to request for proposals number 529-10-0020. You state you will release some of the requested information. Although the commission takes no position with respect to the public availability of the submitted information, you indicate its release may implicate the proprietary interests of the following third parties: Evercare of Texas, LLC d/b/a UnitedHealthcare - Texas ("UnitedHealthcare"), Bravo Health Texas, Inc. ("Bravo"), and Amerigroup Texas Inc. ("Amerigroup"). Accordingly, you state, and provide documentation showing, the commission notified these third parties of the commission's receipt of the request for information and of their right to submit arguments to this office as to why their information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered comments submitted by UnitedHealthcare, Bravo, and Amerigroup and reviewed the submitted information.¹

¹We note UnitedHealthcare and Bravo do not object to the release of some of their submitted information.

UnitedHealthcare asserts the information it identified as proprietary is confidential because the company submitted its proposal to the commission with the expectation that the information would remain confidential. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

UnitedHealthcare, Bravo, and Amerigroup assert the information they seek to withhold is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” *See* Gov’t Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person’s claim for exception

as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.² Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision 661 at 5-6 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue).

UnitedHealthcare asserts sections 4.2.3 (section 3), 4.2.6.1, 4.3.9, 4.3.12, and part 4 of the respondent's information and disclosures form are excepted from disclosure under section 552.110(a) of the Government Code. The information UnitedHealthcare seeks to withhold consists of an employee's salary; background information pertaining to the company and regulatory actions, fines, and sanctions taken against the company, including customer information; clinical initiatives; service coordination; and management information systems requirements. We note UnitedHealthcare has made the names of some of the customers it seeks to withhold publicly available on its website. Because UnitedHealthcare has published this information, it has failed to demonstrate how this information is a trade secret. We find, however, the remaining customer information at issue, which we have marked, constitutes trade secrets and must be withheld under section 552.110(a). Although UnitedHealthcare generally asserts the remaining information it seeks to withhold consists of trade secrets, the company has not explained, nor can we discern, how this information meets the definition of a trade secret. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

demonstrated to establish trade secret claim). Accordingly, none of UnitedHealthcare's remaining information may be withheld under section 552.110(a).

Bravo asserts its financial statements, financial report of parent organization and corporate guarantee, and policy and procedures for case management/service coordination process and referral are excepted from disclosure under section 552.110(a). Although Bravo states this information consists of trade secrets, the company has not explained, nor can we discern, how this information meets the definition of a trade secret. *See id.* Accordingly, none of this information may be withheld under section 552.110(a).

Amerigroup asserts its Strategic Outcomes Analysis Report ("SOAR report") and its 2008 Annual Quality Improvement Program Report are trade secrets. Upon review, we agree the SOAR report, which we marked, must be withheld as a trade secret under section 552.110(a) of the Government Code. However, Amerigroup has failed to demonstrate how the remaining information it seeks to withhold meets the definition of a trade secret. Therefore, Amerigroup's remaining information at issue may not be withheld under section 552.110(a).

UnitedHealthcare, Bravo, and Amerigroup also assert the remaining information they seek to withhold is excepted from disclosure under section 552.110(b). None of these companies, however, has provided any specific factual evidence demonstrating how the release of the information at issue would cause the company substantial competitive harm. *See* ORD Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Therefore, none of the remaining information UnitedHealthcare, Bravo, and Amerigroup seek to withhold is excepted under section 552.110(b).

In summary, the commission must withhold the customer information we marked in UnitedHealthcare's documents and the SOAR report we marked in Amerigroup's documents under section 552.110(a) of the Government Code. As no further exceptions have been raised, the remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/em

Ref: ID# 395242

Enc. Submitted documents

c: Requestors
(w/o enclosures)

Ms. Rachael K. Padgett
Attorney for Amerigroup Texas, Inc.
McGinnis, Lochridge, & Kilgore, LLP
600 Congress Avenue, Suite 2100
Austin, Texas 78701
(w/o enclosures)

Mr. Peter C. Connor, MPH
Counsel for UnitedHealthcare-Texas
12018 Sunrise Valley Drive
Reston, Virginia 20191
(w/o enclosures)

Ms. Brooke A. Spence
Attorney for Bravo Health Texas, Inc.
Greenberg Traurig, LLP
1000 Louisiana Street, Suite 1700
Houston, Texas 77002
(w/o enclosures)